SUPREME COURT, U. S.

23-

No. 1133

In The

Supreme Court of the United States

October Term, 1973

PHILIP W. SMITH,

Petitioner,

vs.

BENNETT M. STEWART and STANLEY T. KUPSTA, JR., PROMISE W. COURNEY, and MARIE H. GUTHRIE, Individually and as the members of the Board of Election Commissioners, and as members of the Board of ELECTION COMMISSIONERS,

Respondents.

AUGUSTUS A. SAVAGE,

Petitioner,

vs.

WILSON FROST and STANLEY T. KUPSTA, JR., PROMISE W. COURNEY, and MARIE H. GUTHRIE, Individually and as the members of the Board of Election Commissioners, and as members of the Board of ELECTION COMMISSIONERS,

Respondents.

BRIEF OF BENNETT STEWART AND WILSON FROST, RESPONDENTS, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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BENNETT M. STEWART and STANLEY T. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

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Respondents.

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STATEMENT OF THE CASES.

The February 23, 1971 Aldermanic Election in the City of Chicago was a regularly scheduled election for Alderman in each of the 50 Wards of the City of Chicago. The terms of the incumbents involved in this case will end in April, 1975. The next Aldermanic Election will be held in February, 1975. The Petitioners' Statement of the Cases should be examined in the light of the decision of the trial court and of the Illinois Appellate Court that what Petitioners refer to as fact was insufficient to warrant an election contest being allowed to proceed in the courts of Illinois. Further, we do not believe that the inferences drawn by the Petitioners from the Complaints (Pet.App. C & G) and stated as facts in their Statement of the Cases are warranted, even as advocacy.

REASONS FOR NOT GRANTING THE WRIT.

I.

THE QUESTIONS PETITIONERS SEEK TO PRESENT FOR REVIEW WERE NOT RAISED BELOW.

The "Questions Presented" in the Petition For A Writ of Certiorari in reality appear to suggest two basic questions:

1. Whether the state requirement of specificity of pleading invoked in this case violated the due process clause of the XIV Amendment to the Constitution of the United States; and

2. Whether the state statutory limitation of five days in which to specifically plead facts sufficient to show a right to maintain an election contest proceeding violates the due process clause of the XIV Amendment to the Constitution of the United States.

Neither the "Questions Presented" in the "Petition For A Writ Of Certiorari" nor the questions suggested as the basic questions raised by the Petition were raised in the proceedings below. The Petitioners, in their briefs before the Illinois Appellate Court, as an issue presented for review, state the question:

> In dismissing the complaint, did the court below violate plaintiff's rights under the XIV Amendment to the United States Constitution. . . . (Res.App. A1, B1)

The Appellate Court of Illinois, First District, in disposing of that question stated:

> Plaintiff next contends that the decision of the trial court violates his federal and state constitutional rights. He cites no authority nor could we find any, even suggesting that the statutory requirement is unconstitutional." *Savage* v. *Frost,* 14 Ill.App.3d 1036, 304 N.E.2d 1, 3 (1973); *Smith* v. *Stewart,* 14 Ill.App.3d 1039, 304 N.E.2d 3, 5 (1973).

It thus appears that the constitutional question, if it exists in this case, was not urged and briefed below. (Res. App. A1-9, B1-9). In that circumstance, this case may not properly be maintained in this Court, *Susie A. Tyrell, etc.* v. *District of Columbia,* 243 U.S. 1, 37 S.Ct. 361 (1971), absent some exceptional consideration. *Duignan* v. *United States,* 274 U.S. 195, 47 S.Ct. 566 (1927). No exceptional circumstances are offered for consideration by the Petition. We urge, on that basis alone, the denial of the Petition For A Writ Of Certiorari.

II.

THE STATE COURTS' DECISIONS IN THESE CASES ARE IN ACCORD WITH THE DECISIONS OF THIS COURT.

The Petitioners conclude the first point in the Reasons For Granting The Writ by stating "The issues are truly of major significance." They cite and quote from *Wesberry* v. *Sanders,* 376 U.S. 1, 17, 84 S.Ct. 526 (1964) and *Williams* v. *Rhodes,* 393 U.S. 23, 30, 89 S.Ct. 5, 10 (1968). No person cognizant of the Constitution of the United States and the development of the law in the area of personal rights in elections would take issue with the abstract statements of the law and quotations. However, those statements have no relationship to the failure of a candidate to plead substantially enough to warrant a court entertaining his complaint. The Petitioners assert that the

decisions of the Appellate Court of Illinois in these cases have determined that there is no remedy for vote fraud in Aldermanic Elections in Chicago. Nothing could be further from the truth. See: Ill.Rev.Stats., Ch. 46 §§29A-1, 29A-8. The County Prosecutor, the United States District Attorney and the election authorities have prosecuted persons for misconduct in elections since those decisions.

The trial court determined that these Petitioners did not plead sufficiently to warrant the court entertaining their cases and the Appellate Court of Illinois agreed. The Petitioners seem to rely primarily on their assertions that election irregularities are prevalent in Chicago. This assertion, while it may well have significant appeal for demagogic politicians, has not been demonstrated to be true, nor was the claim made below.

The federal court has considered the question of whether or not a five day time requirement in an Aldermanic Election is a denial of due process. The Court of Appeals for the 7th Circuit in *Briscoe* v. *Kusper,* 435 F.2d 1046, 1056 (1970) held, in a case involving the 1967 Aldermanic Election in Chicago, that a similar five day time limit for initiating action to secure a remedy did not contravene the due process requirements of the XIV Amendment to the Constitution of the United States.

This court in *Lindsey* v. *Normet,* 405 U.S. 56, 92 S.Ct. 862 (1972), in ruling on the constitutionality of a requirement of trial not later than six days after service of the complaint contained in the Oregon Forcible Entry and Wrongful Detainer Statute, rejected the assertion of the Plaintiff that the due process clause of the XIV Amendment was violated by that statutory requirement. This in a case where shelter, one of the basic requirements of

man, was threatened; if the Plaintiff was without funds with which to post the bond required by the Oregon statute while the case was pending, it appears that the detainor was dispossessed.

Thus, it appears that the Illinois Appellate Court in *Smith* v. *Stewart, supra, Savage* v. *Frost, supra,* the Court of Appeals for the 7th Circuit in *Briscoe* v. *Kusper, supra,* and this Court in *Lindsey* v. *Normet, supra,* have all ruled that a short period of limitation found in state statutes does not violate the due process clause of the XIV Amendment to the Constitution of the United States. No decision of or dicta from any court to the contrary is submitted by the Petitioners. The Petitioners' conclusion that "The issues are truly of major significance" fades into insignificance in the light of reasonable examination.

III.

PETITIONERS DID NOT RAISE, BRIEF OR ARGUE ANY DUE PROCESS CLAIM, PROCEDURAL OR SUBSTANTIVE, BELOW.

The reliance of the Petitioners on *Surowitz* v. *Hilton Hotels Corporation,* 383 U.S. 363, 86 S.Ct. 845 (1966), in Part 2 of their Brief is unwarranted. *Surowitz* presented a question of the proper construction of the then existing Rule 23(b) of the Federal Rules of Civil Procedure, a matter of construction wholly within the competence of the federal courts. The pleading requirements in this case are governed by Ch. 24, §21-27, Ill.Rev.Stats. and Ch. 46, §7-63, Ill.Rev.Stats., and the primary court to determine the proper construction of those statutes are the courts of Illinois. This Court on numerous occasions has required the federal courts to await construction of state statutes

before determining the federal constitutionality of the statute. *Reetz* v. *Bozanich*, 397 U.S. 82, 90 S.Ct. 788 (1970); *Lake Carriers Association* v. *MacMullan*, 406 U.S. 498, 92 S.Ct. 1749 (1972); *Clay* v. *Sun Insurance Office Limited*, 363 U.S. 207, 80 S.Ct. 1222 (1960). That construction has been made in this case but the Petitioners neither adequately briefed or argued any constitutional question below. (Res.App. A,B). We concede that the construction of the Illinois statute is not final on the question of the constitutionality of the statute, but the constitutionality of the statute involved in this case, Ch. 24, §21-27, Ill. Rev.Stats., has not been attacked by the Petitioners either in the trial court, in the Illinois Appellate Court or this Court.

The contention of the Petitioners that the dismissal of a complaint without the hearing of evidence is denial of a hearing is totally without merit. A Motion to Dismiss the complaint for failure to state a claim upon which relief may be granted is the usual method in the federal courts of testing the legal sufficiency of a complaint. The same role is played in the Illinois State courts by a motion to dismiss the complaint as substantially insufficient as a matter of law. *Wuellner* v. *Illinois Bell Telephone Co.*, 390 Ill. 126, 60 N.E.2d 867 (1945); *People for Use of Dyer* v. *Sawyer*, 284 Ill.App. 463, 2 N.E.2d 343 (1936); *Richards* v. *Leimbacher*, 267 N.E.2d 523, 525 (1971). It is obvious that the Petitioners' real complaint is that they were not allowed to present evidence on an insufficient complaint. They had a judicial hearing and an order was entered. (Pet.App. 15a, 36a). Petitioners neither cite nor allude to any authority supporting any right to present evidence on an insufficient complaint. The Petitioners here, as they did in the Appellate Court of Illinois, have furnished no authority for the novel position they urge.

IV.

THERE ARE NO PRINCIPLES INVOLVED IN THIS CASE WARRANTING THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The statements of the Petitioners in part three of their Reasons for Granting A Writ of Certiorari impugn the integrity of every plaintiff and suggests subornation of perjury by every lawyer who represents a plaintiff in an election contest proceeding in Illinois. As in their brief before the Illinois Appellate Court, they state no authority to support the extravagant position which they urge. The Supreme Court of Illinois has considered the requirements of pleadings in election contest cases and approved pleading on information and belief in *Smiley* v. *Lenane,* 363 Ill. 66, 1 N.E.2d 213, 216 (1936). The Illinois Appellate Court in both *Savage* v. *Frost, supra,* at page 2, and *Smith* v. *Stewart, supra,* at page 4, relied on a prior decision of the Illinois Supreme Court, *Zahray* v. *Emricson,* 25 Ill.2d 121, 124, 182 N.E.2d 756, 758 (1962), and quoted and stated:

> "Equally certain is the principle that the proceedings cannot be employed to allow a party, on mere suspicion to have the ballots opened and subjected to scrutiny to find evidence upon which to make a tangible charge." In following this principle the courts are obliged to insure carefully that all the statutory procedures are fulfilled when an election contest complaint is filed.

We respectfully suggest that particularly apt in considering this case is the statement of this Court in *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 79, 75 S.Ct. 614, 619 (1955), that:

> . . . it is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . . .

This case is one where two defeated political candidates seek to gain a right to examine ballots apparently to find out if there is any basis on which they can overturn the will of the people in a proper election. It involves no principle which is of importance to the people.

The Petitioners have not brought themselves within the considerations governing review by a Writ of Certiorari as set out in Rule 19 of the rules of this Court.

We respectfully suggest that for all of the foregoing reasons the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

No. 56746

IN THE

[redacted] Court of Illinois

PHILLIP G. SMITH,

Plaintiff-Appellant,

vs.

BENNETT M. STEWART, and STANLEY J. KUSPER, JR., FRANCIS P. CANARY AND MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, County Division.
Circuit Court No. 71 Co. 283.

Honorable Harry G. Comerford, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT

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Oral Argument Requested

IN THE

Supreme Court of Illinois

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Honorable **Harry G. Comerford**, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT

NATURE OF THE CASE

Plaintiff's election contest complaint was dismissed by the court below for failure to state a cause of action under the relevant statute, Ch. 24, ¶21-27, Ill.Rev.Stat. 1969. Plaintiff appeals the order of dismissal. The issues presented are raised by the pleadings.

ISSUES PRESENTED FOR REVIEW

(1) In dismissing the complaint, did the court below violate plaintiff's rights under the 14th Amendment to the

United States Constitution or the due process and "free and equal elections" provisions of the Illinois Constitution?

(2) Did the complaint state a cause of action under Ch. 24, §21-27, Ill.Rev.Stat. 1969?

JURISDICTION

This direct appeal from the Circuit Court of Cook County invokes this Court's jurisdiction under §302(a)(2) of this Court's rules because it involves a question arising under the federal and Illinois constitutions. The direct appeal is proper, *see, e.g., Thompson* v. *Conti,* 39 Ill.2d 160, 165 (1968); *Craig* v. *Peterson,* 39 Ill.2d 191 (1968).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Ch. 24, §21-27, Ill.Rev.Stat. 1969:

> (Election contest—Petition.) Any candidate whose name appears on the ballots used in any ward of the city at any election for alderman, may contest the election of the candidate who appears to be elected from such ward on the face of the returns, or may contest the right of the candidates who appear to have received the highest and second highest number of votes to places on the official ballot at any supplementary election, by filing within 5 days after such election with the Clerk of the Circuit Court of Cook County, a complaint in writing, verified by the candidate making the contest, setting forth the grounds of the contest. The contestant in each contest shall also serve notice on all persons who were candidates for alderman of such ward at the election, within such 5 days, informing them that such complaint has been or will be filed. The judge of the Circuit Court of Cook County shall have jurisdiction to hear and determine such contest. All proceedings in relation to such con-

test after the filing of such complaint shall be the same, as near as may be, as provided for in the case of a contest at a primary election in such city. In case the court shall decide that the complaint is insufficient in law, or that the candidate who appears to have been elected on the face of the return has been duly elected, the complaint shall be dismissed. If it shall appear to the satisfaction of the court that the face of the returns are not correct, and that the candidate who appears thereby to have been elected was not in fact elected, then the candidates having the highest and second highest number of votes as determined by such contest shall be candidates at the subsequent supplementary election as provided for in section 21-26. As amended by act approved Aug. 24, 1965. L.1965, p. 3375.

14th Amendment, United States Constitution:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. II, §2, Illinois Constitution of 1870:

No person shall be deprived of life, liberty or property, without due process of law.

Art. I, §2, Illinois Constitution of 1970:

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Art. II, §18, Illinois Constitution of 1870 and Art. III, §3, Illinois Constitution of 1970:

All elections shall be free and equal.

POINTS AND AUTHORITIES

I.

THE DECISION BELOW VIOLATES PLAINTIFF'S RIGHTS UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS.

Gray v. *Sanders*, 372 U.S. 368 (1963).

United States v. *Classic*, 313 U.S. 299 (1941).

Boddie v. *Connecticut*, ... U.S. ....., 28 L.Ed.2d 113 (1971).

Craig v. *Peterson*, 39 Ill.2d 191 (1968).

Lehman v. *Hill*, 414 Ill. 173 (1953).

II.

THE COMPLAINT PROPERLY PLEADED A CAUSE OF ACTION UNDER SECTION 21-27.

Whitzell v. *Rutherford*, 118 Ill.App.2d 401 (5th Dist. 1969). [No citations since decided.]

Easdale v. *Sparta Community School District*, 29 Ill.2d 554 (1963).

MacGuidwin v. *South Park Commissioners*, 333 Ill. 58 (1928).

Zahray v. *Emricson*, 25 Ill.2d 121 (1962).

Ch. 24, §21-27, Ill.Rev.Stat. 1969.

STATEMENT OF FACTS

The complaint was dismissed for failure to state a cause of action. Therefore, this statement of facts treats the factual allegations of the complaint as being true.

On February 23, 1971, the City of Chicago conducted an election for the office of Alderman of the 21st Ward. (R. C3.) Plaintiff Smith won that election by more than 800 votes. (R. C7.) However, because of a series of deliberate miscounts and other frauds (see R. C-7-15) the official canvass recorded, and the statutory election board proclaimed, that defendant Stewart had won by 518 votes out of 9,936 votes cast. (R. C3.)

Plaintiff then commenced this action by filing his verified election contest complaint within the five-day statute of limitations imposed by Ch. 24, §21-27, Ill.Rev.Stat. 1969. The complaint prayed that a recount of the ballots (this was a paper ballot election, rather than one conducted by use of voting machines, see R. C3) be conducted. (R. C11-12.)

In support of its allegation that the plaintiff had been defrauded of his victory, the complaint "by way of example only" (R. C8, ¶9) detailed a series of specific wrongs which had been committed by the judges of election in the 21st Ward on election day. (R. C8-10, ¶9.)

The following table sets out some of the specific wrongs alleged in the complaint. It shows the votes actually cast for each candidate in five precincts. It contrasts these "actual" totals with the "canvass" totals, *i.e.*, the totals fraudulently reported to, and proclaimed by, the Circuit Court in the official canvass. (The numbers in the table are taken from the respective allegations of paragraph 9 of the complaint. R. C8-10.)

	VOTES FOR PLAINTIFF		VOTES FOR STEWART	
Precinct	Actual	Canvass	Actual	Canvass
21	129	63	63	129
53	93	74	74	93
42			42	100
59			85	94
70	110	55	55	110

In addition to the miscounts set forth in the table, the complaint specifies miscounts aggregating 58 votes in two additional precincts (R. C8-9, ¶¶9(a) and (f)), and alleges that in at least two other precincts Plaintiff's watchers were illegally precluded from observing the count. (R. C10, ¶9(i).) The complaint alleges over 400 miscounted votes in addition to those specified above. (R. C9-10, ¶ 9(h).)

Defendants filed answers to the complaint, denying Plaintiff's key factual allegations and adding a contention that Plaintiff's complaint was insufficient in any event. (R. C19-21, 24-27.) The trial court dismissed the complaint as insufficient on its face. (R. C38.)

ARGUMENT

I.

THE DECISION BELOW VIOLATES PLAINTIFF'S RIGHTS UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS.

> "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote."
>
> *Moore* v. *Ogilvie*, 394 U.S. 814, 818 (1969).

In effect, the court below held that despite the fact that plaintiff received a majority of the votes cast in the 21st Ward, it was proper and permissible for the defendant Stewart to be sworn in as the duly elected alderman of the 21st Ward. This characterization of the holding below follows ineluctably from the circumstances that:

(1) The complaint clearly sets forth the factual allegation that plaintiff received a majority of the ballots cast. (R. C6-7, ¶7; R. C10, ¶9-2.)

(2) For present purposes the factual allegations of the complaint must be taken as true, because the court below dismissed the complaint on motion, without taking any evidence.

Thus, the court below has sanctioned the wrongful installation of an important elected official who received a minority of the ballots cast while denying all relief to the candidate who was in fact elected by a majority vote.

No more basic violation of the constitutional right of the candidate and his constituents to have their votes "correctly counted and reported . . . [and] protected from the diluting effect of illegal ballots," *Gray* v. *Sanders*, 372 U.S. 368, 380 (1963), can be imagined.*

The conduct by the judges of election which is related in the complaint unquestionably violated plaintiff's federal constitutional rights. See, *e.g.*, *United States* v. *Classic*, 313 U.S. 299 (1941). It also violated the due process and "free and equal elections" provisions of the Illinois Constitutions of 1870 (Art. II, §§ 2 and 18) and 1970 (Art. I, §2 and Art. III, § 3):

> "When the ballot-box becomes the receptacle of fraudulent votes the freedom and equality of elections are destroyed. That election is free and equal where all of the qualified electors in the precinct are carefully distinguished from the unqualified and are protected in the right to deposit their ballots in safety and unprejudiced by fraud."
>
> *Lehman* v. *Hill*, 414 Ill. 173, 178 (1953) quoting from *Emery* v. *Hennessy*, 331 Ill. 296 (1928).
>
> "Elections are equal when the vote of each voter is equal in its influence upon the result to the vote of every other elector—where each ballot is as effective as every other ballot."
>
> *Craig* v. *Peterson*, 39 Ill. 2d 191, 195 (1968) quoting *Moran* v. *Bowley*, 347 Ill. 148, 162-3 (1932).

Since the official conduct set forth in the complaint is unconstitutional, the State is constitutionally compelled to afford plaintiff "a meaningful opportunity to be heard." *Boddie* v. *Connecticut*, ... U.S. ....., 28 L.Ed.2d 113, 118

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* Plaintiff is a qualified voter who voted in the 21st Ward election here involved, see R. C3-4, ¶2.

(1971). But the only meaningful and effective "opportunity to be heard" which Illinois affords to the victims of the constitutional wrongs involved in this case is the remedy which the court below has refused—an election contest under Ill.Rev.Stat. Ch. 24, §21-27. The enormity of this result is magnified by the circumstance that the wrongdoing officials involved were, by statute, the agents of the very court which has now refused all remedy for their misconduct. Ill. Rev. Stat. Ch. 46, §§ 6-21, 14-5.

II.

THE COMPLAINT PROPERLY PLEADED A CAUSE OF ACTION UNDER SECTION 21-27.

The requirements for a proper election contest complaint have been concisely summarized in the most recent reported Illinois opinion to consider the subject:

> ". . . [T]he petition must allege: that a mistake or fraud was committed; that some irregularities occurred in the conduct of the election; and that the results of the election were changed by the fraud or irregularities. . . . Our examination of the pleadings reveals that these requirements were . . . met by the petitioner. While the specific irregularities are not set out in the petition, this is not necessary and general allegations are sufficient. *Joyce* v. *Blankenship*, 399 Ill. 136, 77 NE2d 325 (1948)."
>
> *Whitsell* v. *Rutherford*, 118 Ill.App.2d 401, 405 (5th Dist. 1969) (Eberspacher, Moran, and Goldenhersh, JJ.)

The present complaint clearly meets the above criteria. *Accord, Easdale* v. *Sparta Community School District*, 29 Ill. 2d 554 (1963).

MacGuidwin v. *South Park Commissioners*, 333 Ill. 58 (1928) is squarely in point on the decisive issue here. The recount petition which this Court sustained in that case was, in its key allegations, verified on the petitioners' information and belief (333 Ill. at 63) and was in all relevant respects comparable to the allegations in the present complaint. (See the Court's careful summary of the complaint, 333 Ill. at 63-71.) Note that the petitioners in *McGuidwin*, like the plaintiff here, were forced to estimate the numbers of miscounted or uncounted votes. (333 Ill. at 65-67).*

In appraising the applicability of the above cases to the present controversy, it is important to note that the present complaint deals with a reasonably close election, that it sets forth numerous specific examples of outrageous fraud and vote stealing with great particulity, and that it clearly alleges that a recount would change the result. Given the rule that "the pleadings in contest proceedings are not required to comply with the strict technical rules applicable in civil actions," *Zahray* v. *Emrieson*, 25 Ill. 2d 121, 124 (1962), it is clear that the complaint is sufficient to warrant a recount, because its allegations, if true, constitute the required "adequate and well-defined cause" for setting aside the results of the election. *Ibid.* See *Easdale* v. *Sparta Community School District*, 29 Ill.2d 554, 557-58 (1963).

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*Defendants have attacked the complaint because it "estimates" what the results of a recount will be. However, it is hard to understand how a truthful and honest plaintiff could ever do more than estimate the result of a recount which has not yet taken place.

CONCLUSION

For the foregoing reasons, the order of the Circuit Court dismissing plaintiff's complaint should be reversed and the cause remanded with instructions to conduct the recount, hold a hearing on the factual issues raised by the pleadings and grant the other relief prayed by the complaint if the evidence so warrants.

Respectfully submitted,

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APPENDIX B

No. 56750

IN THE

APP [redacted] Court of Illinois

AUGUSTUS A. SAVAGE,

Plaintiff-Appellant,

vs.

WILSON FROST, and STANLEY J. KUSPER, JR., FRANCIS P. CANARY AND MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, County Division.

Circuit Court No. 71 Co. 282.

Honorable Harry G. Comerford, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT

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Oral Argument Requested

IN THE

Supreme Court of Illinois

AUGUSTUS A. SAVAGE,

Plaintiff-Appellant,

vs.

WILSON FROST, and STANLEY J. KUSPER, JR., FRANCIS P. CANARY AND MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, County Division.

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BRIEF OF PLAINTIFF-APPELLANT

NATURE OF THE CASE

Plaintiff's election contest complaint was dismissed by the court below for failure to state a cause of action under the relevant statute, Ch. 24, ¶21-27, Ill.Rev.Stat. 1969. Plaintiff appeals the order of dismissal. The issues presented are raised by the pleadings.

ISSUES PRESENTED FOR REVIEW

(1) In dismissing the complaint, did the court below violate plaintiff's rights under the 14th Amendment to the

United States Constitution or the due process and "free and equal elections" provisions of the Illinois Constitution?

(2) Did the complaint state a cause of action under Ch. 24, §21-27, Ill.Rev.Stat. 1969?

JURISDICTION

This direct appeal from the Circuit Court of Cook County invokes this Court's jurisdiction under §302(a)(2) of this Court's rules because it involves a question arising under the federal and Illinois constitutions. The direct appeal is proper, *see, e.g., Thompson* v. *Conti,* 39 Ill.2d 160, 165 (1968); *Craig* v. *Peterson,* 39 Ill.2d 191 (1968).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Ch. 24, §21-27, Ill.Rev.Stat. 1969:

> (Election contest—Petition.) Any candidate whose name appears on the ballots used in any ward of the city at any election for alderman, may contest the election of the candidate who appears to be elected from such ward on the face of the returns, or may contest the right of the candidates who appear to have received the highest and second highest number of votes to places on the official ballot at any supplementary election, by filing within 5 days after such election with the Clerk of the Circuit Court of Cook County, a complaint in writing, verified by the candidate making the contest, setting forth the grounds of the contest. The contestant in each contest shall also serve notice on all persons who were candidates for alderman of such ward at the election, within such 5 days, informing them that such complaint has been or will be filed. The judge of the Circuit Court of Cook County shall have jurisdiction to hear and determine such contest. All proceedings in relation to such con-

test after the filing of such complaint shall be the same, as near as may be, as provided for in the case of a contest at a primary election in such city. In case the court shall decide that the complaint is insufficient in law, or that the candidate who appears to have been elected on the face of the return has been duly elected, the complaint shall be dismissed. If it shall appear to the satisfaction of the court that the face of the returns are not correct, and that the candidate who appears thereby to have been elected was not in fact elected, then the candidates having the highest and second highest number of votes as determined by such contest shall be candidates at the subsequent supplementary election as provided for in section 21-26. As amended by act approved Aug. 24, 1965. L.1965, p. 3375.

14th Amendment, United States Constitution:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. II, §2, Illinois Constitution of 1870:

No person shall be deprived of life, liberty or property, without due process of law.

Art. I, §2, Illinois Constitution of 1970:

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Art. II, §18, Illinois Constitution of 1870 and Art. III, §3, Illinois Constitution of 1970:

All elections shall be free and equal.

POINTS AND AUTHORITIES

I.

THE DECISION BELOW VIOLATES PLAINTIFF'S RIGHTS UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS.

Gray v. *Sanders*, 372 U.S. 368 (1963).

United States v. *Classic*, 313 U.S. 299 (1941).

Boddie v. *Connecticut*, ... U.S. ....., 28 L.Ed.2d 113 (1971).

Craig v. *Peterson*, 39 Ill.2d 191 (1968).

Lehman v. *Hill*, 414 Ill. 173 (1953).

II.

THE COMPLAINT PROPERLY PLEADED A CAUSE OF ACTION UNDER SECTION 21-27.

Whitsell v. *Rutherford*, 118 Ill.App.2d 401 (5th Dist. 1969). [No citations since decided.]

Easdale v. *Sparta Community School District*, 29 Ill.2d 554 (1963).

MacGuidwin v. *South Park Commissioners*, 333 Ill. 58 (1928).

Zahray v. *Emricson*, 25 Ill.2d 121 (1962).

Ch. 24, §21-27 Ill.Rev.Stat. 1969.

STATEMENT OF FACTS

The complaint was dismissed for failure to state a cause of action. Therefore, this statement of facts treats the factual allegations of the complaint as being true.

On February 23, 1971, the City of Chicago conducted an election for the office of Alderman of the 34th Ward. (R. C3.) Plaintiff Savage won that election by more than 600 votes. (R. C7.) However, because of a series of deliberate miscounts and other frauds (see R. C7-15) the official canvass recorded, and the statutory election board proclaimed, that defendant Frost had won by about 1400 votes out of some 10,000 votes cast. (R. C3.)

Plaintiff then commenced this action by filing his verified election contest complaint within the five-day statute of limitations imposed by Ch. 24, §21-27 Ill.Rev.Stat. 1969. The complaint prayed that a recount of the ballots (this was a paper ballot election, rather than one conducted by use of voting machines, see R. C3) be conducted. (R. C16-17.)

In support of its allegation that the plaintiff had been defrauded of his victory, the complaint "by way of example only" (R. C9, ¶9) detailed a series of specific wrongs which had been committed by the judges of election in the 34th Ward on election day.

The complaint charged that in 16 specified precincts, plaintiff's "duly qualified and accredited watchers and challengers . . . were prevented by [the] judges from observing the count and tally of the ballots." (R. C9-10, ¶¶9(b) and (c).)

The complaint charged that in the 14th Precinct, after the polls closed, plaintiff's watchers were illegally expelled from the polling place prior to the count. Then the judges "counted" 243 votes for defendant Frost and only 3 votes for plaintiff. The complaint then states that "Representatives of plaintiff have already obtained at least 115 affidavits from registered voters who voted in the 14th precinct and who have sworn under oath that they voted for plaintiff in the election." (R. C11-12, ¶9(i).)

A long series of specific allegations of vote stealing in particular precincts was included in the complaint.* The following table shows with respect to each of 16 precincts in the ward the number of votes *actually* cast for each candidate. It contrasts these "actual" totals with the "canvass" totals, *i.e.*, the totals fraudulently reported to, and proclaimed by, the Circuit Court in the official canvass. (The numbers in the table are taken from the respective allegations of paragraph 9 of the complaint, R. C9-15.)

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* The complaint set forth two additional instances in which plaintiff had obtained affidavits from his voters in a number which far exceeded the number of votes credited to plaintiff on the official canvass. (See R. C12, ¶9(k); R. C14, ¶9(r).) Given the five-day limitations period imposed by the statute, plaintiff's accumulation of affidavits from so many individual voters represents an extraordinary demonstration of the non-frivolity of his request for a recount.

Precinct	VOTES FOR PLAINTIFF		VOTES FOR FROST	
	Actual	Canvass	Actual	Canvass
5	155	120		
6	170	121	100	145
7	155	47	40	155
9	212	154		
10	272	175		
12	198	121		
14	223	3	23	243
16	223	57		
19	122	16	16	122
21	88	52	52	88
22	147	44	44	147
23	200	140		
32	252	222	150	182
34	120	52	52	120
49	229	15	15	229
52	58	12		

Defendants answered, denying plaintiff's key factual allegations and adding a contention that plaintiff's complaint was insufficient in any event. (R. C28-31, 34-37.) The trial court dismissed the complaint as insufficient on its face. (R. C50.)

ARGUMENT

I.

THE DECISION BELOW VIOLATES PLAINTIFF'S RIGHTS UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS.

> "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote."
>
> *Moore* v. *Ogilvie*, 394 U.S. 814, 818 (1969).

In effect, the court below held that despite the fact that plaintiff received a majority of the votes cast in the 34th Ward, it was proper and permissible for the defendant Frost to be sworn in as the duly elected alderman of the 34th Ward. This characterization of the holding below follows ineluctably from the circumstances that:

(1) The complaint clearly sets forth the factual allegation that plaintiff received a majority of the ballots cast. (R. C7, ¶7; R. C16, ¶ 12.)

(2) For present purposes the factual allegations of the complaint must be taken as true, because the court below dismissed the complaint on motion, without taking any evidence.

Thus, the court below has sanctioned the wrongful installation of an important elected official who received a minority of the ballots cast while denying all relief to the candidate who was in fact elected by a majority vote.

No more basic violation of the constitutional right of the candidate and his constituents to have their votes "correctly counted and reported . . . [and] protected from the diluting effect of illegal ballots," *Gray* v. *Sanders*, 372 U.S. 368, 380 (1963), can be imagined.*

The conduct by the judges of election which is related in the complaint unquestionably violated plaintiff's federal constitutional rights. See, *e.g.*, *United States* v. *Classic*, 313 U.S. 299 (1941). It also violated the due process and "free and equal elections" provisions of the Illinois Constitutions of 1870 (Art. II, §§ 2 and 18) and 1970 (Art. I, §2 and Art. III, § 3):

> "When the ballot-box becomes the receptacle of fraudulent votes the freedom and equality of elections are destroyed. That election is free and equal where all of the qualified electors in the precinct are carefully distinguished from the unqualified and are protected in the right to deposit their ballots in safety and unprejudiced by fraud."
>
> *Lehman* v. *Hill*, 414 Ill. 173, 178 (1953) quoting from *Emery* v. *Hennessy*, 331 Ill. 296 (1928).
>
> "Elections are equal when the vote of each voter is equal in its influence upon the result to the vote of every other elector—where each ballot is as effective as every other ballot."
>
> *Craig* v. *Peterson*, 39 Ill. 2d 191, 195 (1968) quoting *Moran* v. *Bowley*, 347 Ill. 148, 162-3 (1932).

Since the official conduct set forth in the complaint is unconstitutional, the State is constitutionally compelled to afford plaintiff "a meaningful opportunity to be heard." *Boddie* v. *Connecticut*, ... U.S. ....., 28 L.Ed.2d 113, 118

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* Plaintiff is a qualified voter who voted in the 34th Ward election here involved, see R. C3-4, ¶2.

(1971). But the only meaningful and effective "opportunity to be heard" which Illinois affords to the victims of the constitutional wrongs involved in this case is the remedy which the court below has refused--an election contest under Ill.Rev.Stat. Ch. 24, §21-27. The enormity of this result is magnified by the circumstance that the wrongdoing officials involved were, by statute, the agents of the very court which has now refused all remedy for their misconduct. Ill. Rev. Stat. Ch. 46, §§ 6-21, 14-5.

II.

THE COMPLAINT PROPERLY PLEADED A CAUSE OF ACTION UNDER SECTION 21-27.

The requirements for a proper election contest complaint have been concisely summarized in the most recent reported Illinois opinion to consider the subject:

> ". . . [T]he petition must allege: that a mistake or fraud was committed; that some irregularities occurred in the conduct of the election; and that the results of the election were changed by the fraud or irregularities. . . . Our examination of the pleadings reveals that these requirements were . . . met by the petitioner. While the specific irregularities are not set out in the petition, this is not necessary and general allegations are sufficient. *Joyce* v. *Blankenship,* 399 Ill. 136, 77 NE2d 325 (1948)."
>
> *Whitsell* v. *Rutherford,* 118 Ill.App.2d 401, 405 (5th Dist. 1969) (Eberspacher, Moran, and Goldenhersh, JJ.)

The present complaint clearly meets the above criteria. *Accord, Easdale* v. *Sparta Community School District,* 29 Ill. 2d 554 (1963).

MacGuidwin v. *South Park Commissioners*, 333 Ill. 58 (1928) is squarely in point on the decisive issue here. The recount petition which this Court sustained in that case was, in its key allegations, verified on the petitioners' information and belief (333 Ill. at 63) and was in all relevant respects comparable to the allegations in the present complaint. (See the Court's careful summary of the complaint, 333 Ill. at 63-71.) Note that the petitioners in *McGuidwin*, like the plaintiff here, were forced to estimate the numbers of miscounted or uncounted votes. (333 Ill. at 65-67).*

In appraising the applicability of the above cases to the present controversy, it is important to note that the present complaint deals with a reasonably close election, that it sets forth numerous specific examples of outrageous fraud and vote stealing with great particulity, and that it clearly alleges that a recount would change the result. Given the rule that "the pleadings in contest proceedings are not required to comply with the strict technical rules applicable in civil actions," *Zahray* v. *Emricson*, 25 Ill. 2d 121, 124 (1962), it is clear that the complaint is sufficient to warrant a recount, because its allegations, if true, constitute the required "adequate and well-defined cause" for setting aside the results of the election. *Ibid.* See *Easdale* v. *Sparta Community School District*, 29 Ill.2d 554, 557-58 (1963).

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* Defendants have attacked the complaint because it "estimates" what the results of a recount will be. (R. C44.) However, it is hard to understand how a truthful and honest plaintiff could ever do more than estimate the result of a recount which has not yet taken place.

No. 73-1092

AUG 27

MICHAEL RODAK, JR.

In the

Supreme Court of the United States

OCTOBER TERM, 1973

PHILIP G. SMITH,

Petitioner,

vs.

BENNETT M. STEWART and STANLEY J. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

AUGUSTUS A. SAVAGE,

Petitioner,

vs.

WILSON FROST and STANLEY J. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1632

PHILIP G. SMITH,

Petitioner,

vs.

BENNETT M. STEWART and STANLEY J. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

AUGUSTUS A. SAVAGE,

Petitioner,

vs.

WILSON FROST and STANLEY J. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Brief in Opposition of Respondents Stewart and Frost seeks to make two inter-related points: *first*, that

Petitioners, in attacking the statutory five-day limit for filing an election-contest suit, are assaulting a provision which the courts have repeatedly upheld; *second,* that the constitutional issues were not raised and passed on below.

In both particulars, Respondents are either mistaken or confused, or both. Petitioner's claim that their constitutional rights were violated does not include an attack on the constitutionality of the five-day limit for initiating court action. The constitutional issues were clearly raised and passed on below.

ARGUMENT

I. RESPONDENTS MISSTATE THE QUESTION PRESENTED.

Respondents' principal error is in misreading the "Questions Presented" section of the Petition (Pet., pp. 2-3). Contrary to Respondents' assertions, Petitioners' "Questions" do not involve an attack on the statutory requirement that the Court contest be filed within five days after the election. Thus the second "basic question" set out in Respondents' Brief, at page 3, is simply inaccurate. Petitioners are not raising any such question.

By contending that the Petition poses a question which in fact it does not, Respondents are able—with total irrelevance—to make much of the circumstance that the issue was not raised and briefed below. In fact, they devote most of their Brief to demolishing that straw man.

It is obvious that the Petition presents significant constitutional issues. At the heart of the matter are the due process implications of an absurdly strict requirement of pleading specific facts on the basis of personal knowledge rather than information and belief. That virtually impossible degree of pleading specificity—which the Illinois Appellate Court imposed in the guise of interpreting the statute—is highlighted by the circumstance that the initial pleading must be filed within five days of the election. In that respect the five-day limitation period is significant.

It is one thing, as a general rule of pleading, to require that a complaint be specific and that certain essentials be verified on the pleader's personal knowledge. Cf. Rule 23.1, Federal Rules of Civil Procedure. It is quite another thing to require that such a pleading be

filed within five days of the events out of which the claim arises. In the one instance, while imposing a burden on the pleader, the requirement does not confront him with an impossibility; he has the normal statutory limitations period in which to make an investigation and draft a complaint.

But to impose such a requirement and to insist that it be met within five days of the operative events is something else again. One can do only so much in five days, particularly when most of the evidence is to be found in documents—especially the ballots—which are not accessible to the pleader.

Pleading requirements do have constitutional implications. The right of a person to have his day in court can be rendered illusory simply by requiring that his pleadings measure up to an unrealistic standard of detail and precision, or, given the nature of "facts" and one's ability to learn them, by insisting that he verify only on the basis of personal knowledge. Cf. *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363 (1966).

II. THE CONSTITUTIONAL ISSUES WERE PRESENTED AND ADDRESSED BELOW.

At page 7 of their Brief, Respondents make the following incredible statement. "The Constitutionality of the statute involved in this case, Ch. 24, §21-27, Ill. Rev. Stats., has not been attacked by the Petitioners either in the trial court, in the Illinois Appellate Court or this Court."

Petitioners challenge in this Court, as they did below, the interpretation of the statute in a fashion which deprives them of constitutional rights. And Petitioners have consistently, throughout this litigation, made such constitutional challenge.

In this Court, the "Questions Presented" section of the Petition clearly shows that Petitioners have con-

stitutional objections to the statute as interpreted by the highest court of Illinois which has passed upon it.

In the Illinois Appellate Court, the highest court to rule, Petitioners in their briefs urged that the decision of the trial court violated their rights under the Federal constitution. Among other things, they quoted from *Moore* v. *Ogilvie,* 394 U.S. 814, 818 (1969): "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote." Indeed, Respondents' own Appendices in their Reply Brief here, reproducing Petitioners' briefs filed in the Illinois Appellate Court, show conclusively that the constitutional issues were raised below. Moreover, Respondents themselves, notwithstanding their assertion in their Brief, included in *their* brief filed in the Illinois Appellate Court a section specifically entitled: "II. Plaintiff-Appellant Was Not Deprived Of Any Constituional Rights." (Appendix A)

Apart from the fact that the constitutional issues were addressed below by all parties to the litigation, it is sufficient that the court below reached and decided them for assuring conformity to the necessity of their having been considered. Cf. *Jenkins* v. *Georgia,* 42 U.S.L.W. 5055, 5056 (June 24, 1974); *Raley* v. *Ohio,* 360 U.S. 423, 436 (1959).

The constitutional issues were again raised, in Petitioners' motion filed in the Illinois Supreme Court, when Petitioners there sought to appeal as a matter of right or, alternatively, for leave to appeal. (Appendix B). In that motion, petitioners separately raised the constitutional issues, and further incorporated therein the briefs which Respondent here has attached as Appendices A and B to their Reply Brief in this Court. And, as stated earlier, these Appendices conclusively show that the constitutional issues were raised below.

CONCLUSION

For the foregoing reasons, the order of the Circuit Court dismissing plaintiff's complaint should be reversed and the cause remanded with instructions to conduct the recount, hold a hearing on the factual issues raised by the pleadings and grant the other relief prayed by the complaint if the evidence so warrants.

Respectfully submitted,

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